

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ABELARDO HERRERA	:	SMALL CLAIMS
D/B/A HERRERA GROCERY	:	DETERMINATION
	:	DTA NO. 819657
for Revision of a Determination or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Period December 1, 1999 through August 31, 2002.	:	

Petitioner, Abelardo Herrera d/b/a Herrera Grocery, 51-18 103rd Street, Corona, New York 11368, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1999 through August 31, 2002.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 1740 Broadway, New York, New York on May 4, 2005 at 1:15 P.M. Petitioner appeared by CBS Accounting Service Corp. (Jorge A. Baez, Enrolled Agent). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Chunyip Tsui).

Since neither party herein reserved time to submit a post hearing brief, the three-month period for the issuance of this determination commenced as of the date the hearing was held.

ISSUE

Whether the Division of Taxation properly determined that petitioner's reported taxable sales for the period at issue in this proceeding were understated by \$171,845.46, thereby resulting in additional sales and use taxes due of \$14,177.52.

FINDINGS OF FACT

1. Petitioner, Abelardo Herrera d/b/a Herrera Grocery, has, since 1993, owned and operated as a sole proprietor a small 600-square-foot grocery/convenience store located at 110-52 Sutphin Boulevard, Jamaica, New York. On September 11, 2002, petitioner sold the business for \$70,000.00. Upon the sale of the business, petitioner received \$15,000.00 in cash and two promissory notes totaling \$55,000.00.

2. On or about September 10, 2002, the Division of Taxation (“Division”) received a Notification of Sale, Transfer or Assignment in Bulk from the purchaser of petitioner’s business wherein pertinent details regarding the sale of the business were provided. As the result of its receipt of the Notification of Sale, Transfer or Assignment in Bulk, the Division initiated a field audit of petitioner’s books and records to determine if he had collected and remitted the proper sales and use taxes due for the period December 1, 1999 through August 31, 2002.

3. On October 28, 2002, the Division sent a letter to petitioner scheduling a field audit for November 12, 2002. Petitioner was directed to have available all of his books relating to his sales and use tax liability and was also provided with a comprehensive list of all records required for the audit. Petitioner did not appear for the audit as scheduled, and although subsequent requests were made, no books or records were ever produced for audit.

4. On February 14, 2003, the Division issued a Notice of Determination (“Notice”) to petitioner asserting that \$14,177.52 of additional sales and use taxes were due for the period December 1, 1999 through August 31, 2002. The Notice also asserted that statutory interest of \$2,948.54, asserted pursuant to Tax Law § 1145(a)(1)(ii), was due, together with penalties, imposed pursuant to Tax Law § 1145(a)(1)(i) and (vi), of \$4,888.17.

5. Since petitioner failed to produce any books or records for audit, the Division utilized the results of a prior audit of petitioner's business to compute the tax due for the period at issue. During the prior audit period, which encompassed the period June 1, 1995 through May 31, 1998, petitioner reported a taxable sales ratio of 17.8%. On audit, the Division computed an audited taxable sales ratio of 39.58%. Since petitioner's reported taxable sales ratio for the period at issue had increased only slightly to 21.1%, the Division used the audited taxable sales ratio of 39.58% from the prior audit and applied it to reported gross sales of \$939,364.00 for the current period. This computation produced an audited taxable sales figure of \$371,801.00 ($\$939,364.00 \times 39.58\%$). Reported taxable sales of \$199,956.00 were then subtracted from the audited taxable sales figure of \$371,801.00 to produce an additional taxable sales figure of \$171,845.00. Applying the 8.25% tax rate to additional taxable sales of \$171,845.00 produced the asserted tax due of \$14,177.25.

6. At the hearing, petitioner admitted that for the period in question he maintained no cash register tapes, sales invoices, day book or other records where individual sales were recorded. As noted in Finding of Fact "3", no books and records were submitted by petitioner for review either during the audit stage or at this small claims hearing.

SUMMARY OF THE PARTIES' POSITIONS

7. Petitioner asserts that he was unable to produce any records for audit because all of his books and records were left at the grocery store upon its sale and that they were discarded by the new owner prior to the date that the Division initiated its audit. Petitioner maintains that his sales and use tax returns for the period in dispute accurately reported all taxable sales and that while he agreed to a 39.58% taxable ratio on the prior audit, he did so merely for settlement purposes.

8. The Division maintains that because petitioner failed to produce complete and adequate books and records for audit, it was proper for it to resort to an indirect audit method to determine if any sales and use taxes were due for the period under review. It is the Division's position that its application of the 39.58% taxable ratio as determined on the prior audit to reported gross sales constitutes a legitimate indirect audit methodology. The Division asserts that petitioner has failed to present any credible evidence to show that his taxable ratio was less than 39.58% and that the taxable ratio percentage used in both the prior audit and the current audit is, in its experience, consistent with that reported by other small grocery/convenience stores in the general vicinity.

CONCLUSIONS OF LAW

A. The standard for reviewing a sales tax audit where external indices were employed was set forth in ***Matter of AGDN, Inc.*** (Tax Appeals Tribunal, February 6, 1997), as follows:

a vendor . . . is required to maintain complete, adequate and accurate books and records regarding its sales tax liability and, upon request, to make the same available for audit by the Division (*see*, Tax Law §§ 1138[a]; 1135; 1142[5]; *see, e.g., Matter of Mera Delicatessen*, Tax Appeals Tribunal, November 2, 1989). Specifically, such records required to be maintained 'shall include a true copy of each sales slip, invoice, receipt, statement or memorandum' (Tax Law § 1135). It is equally well established that where insufficient records are kept and it is not possible to conduct a complete audit, 'the amount of tax due shall be determined by the commissioner of taxation and finance from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . . ' (Tax Law § 1138[a]; *see, Matter of Chartair, Inc. v. State Tax Commn.*, 65 AD2d 44, 411 NYS2d 41, 43). When estimating sales tax due, the Division need only adopt an audit method reasonably calculated to determine the amount of tax due (*Matter of Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869); exactness is not required (*Matter of Meyer v. State Tax Commn.*, 61 AD2d 223, 402 NYS2d 74, *lv denied* 44 NY2d 645, 406 NYS2d 1025; *Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, *affd* 44 NY2d 684, 405 NYS2d 454). The burden is then on the taxpayer to demonstrate, by clear and convincing evidence, that the audit method employed or the tax assessed was unreasonable (*Matter of*

Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679; ***Matter of Surface Line Operators Fraternal Org. v. Tully***, 85 AD2d 858, 446 NYS2d 451).

B. In the instant matter, the Division made a timely and adequate request to examine petitioner's books and records. In response, petitioner failed to produce any books and records, and furthermore, he readily admitted that he did not maintain any cash register tapes, sales invoices, day book or any other source documentation concerning his daily sales. This inadequacy in record keeping clearly justified the use of indirect audit methodologies (***Matter of Roebing Liquors v. Commissioner of Taxation & Finance***, 284 AD2d 669, 728 NYS2d 509, 512, ***appeal dismissed***, 97 NY2d 637, 735 NYS2d 493, ***cert denied*** 537 US 186, 154 L Ed 2d 20).

C. When a taxpayer's records are inadequate, the Division may select an audit method reasonably calculated to reflect the sales and use taxes due (Tax Law § 1138[a][1]; ***see, Matter of Grant v. Joseph, supra.***). It is only necessary that sufficient evidence be produced to demonstrate that a rational basis existed for the auditor's calculations (***Matter of Grecian Square v. State Tax Commn.***, 119 AD2d 948, 501 NYS2d 219). Here, the Division's method of determining taxable sales and sales tax due was rational, and petitioner has failed to offer any credible evidence to show that the audit method employed or the tax assessed was unreasonable.

D. The petition of Abelardo Herrera d/b/a Herrera Grocery is denied and the Division's Notice of Determination dated February 14, 2003 is sustained.

DATED: Troy, New York
July 14, 2005

/s/ James Hoefer
PRESIDING OFFICER